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# MICHIGAN LAW REVIEW

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## MILD PUNISHMENTS.<sup>1</sup>

**I**F life, freedom, or hope be taken from man, he is ashes. Therefore we ought not to take away any of them lightly. But some restraint or punishment is necessary. We often miss our aim, however, by prescribing punishments that are too severe, whereupon human nature revolts, so that it is "impossible to combine certainty with severity," a lesson we have long since learned from the experience of England.

During a period of fifteen years in that country 555 verdicts were rendered in which the jury fixed the amount stolen from a dwelling at 39 shillings when it was a capital offense to steal 40 shillings; and when the law changed the amount to 5 pounds, the juries merely raised the value to 4 pounds, 19 shillings.

As late as 1830 the punishment for forgery was death; in that year a thousand bankers, residing in 214 municipalities, presented to Parliament the celebrated petition in which they declared that they "find by experience that the infliction of death, or even a possibility of the infliction of death, prevents the prosecution, conviction, and punishment of the criminal, and thus endangers the property which it is intended to protect."

After the execution of Fauntleroy the lawyers of England signed a similar petition, stating that if the Crown would cease punishing forgery by death, the crime would become less frequent, and when hanging for that offense was abolished the crime became rare.

But it is unnecessary in this day and age to dwell further upon the proposition that punishments which are severe cannot be inflicted with certainty. We may now proceed to discuss mild punishments, first noting another element in deterrence, that is to say, swiftness.

" \* \* \* it is necessary that the punishment should be as near, in

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<sup>1</sup> An address delivered before the National Association of Attorneys General of the United States.

point of time, to the crime, as possible ; because its impression upon the minds of men is weakened by distance ; and because this distance adds to the uncertainty of its infliction, by affording fresh chances of escape."

As this important element is dependent upon criminal procedure it can properly be left without further notice here.

It is but natural that criminal punishments should be severe, for the measure is fixed, by legislator and judge alike, with no thought that it will ever be applied to him ; they therefore partake of the cruelty inseparable from power, and often include revenge, which, as we are aware, is no part of real punishment. Properly organized society in its relation to the criminal is never revengeful. It is a bee, which stings to defend—not a wasp, which pursues to destroy.

"If we could consider an offense which has been committed as an isolated fact, the like of which would never recur, punishment would be useless."

Let us now open the pages of a great book, a century and a half old, written by a humanitarian in an age of cruelty, one of the few books that have come down to us with the badge of authority. It was 20 years in the building, and the only work of the author which securely linked him to future ages—indeed, there seems to be in the life of a man only time enough—in the brain of a man only genius enough—for one great book. The author was a citizen of that great nation which in the present war has earned the admiration of the world.

In *THE SPIRIT OF THE LAWS* a few pages only are devoted to punishment, and a short passage will serve to remind us of MONTESQUIEU'S views upon the subject in hand :

"Experience shows that in countries remarkable for the lenity of penal laws, the spirit of the inhabitants is as much affected by them as in other countries by severer punishments.

"If an inconveniency or abuse arises in the state, a violent government endeavors suddenly to redress it ; and instead of putting the old laws in execution, it establishes some cruel punishment, which instantly puts a stop to the evil. But the spring of government is thereby weakened ; the imagination grows accustomed to the severe as well as to the milder punishment ; and as the fear of the latter diminishes, they are soon obliged in every case to have recourse to the other.

"Men must not be led by excess of violence ; we ought to make a prudent use of the means which nature has given us to conduct them. If we inquire into the cause of all human corruptions, we

shall find that they proceed from the impunity of crimes, and not from the moderation of punishments."

When this book appeared an Italian lad was pursuing his studies. Ten years later, at the age of 26, inspired by MONTESQUIEU, he gave to the world another great book, combining philosophy with humanity and gallantly challenging the accepted penal theories of his day. This work,<sup>2</sup> also, was its author's only claim upon immortality. He says:

"Crimes are more effectually prevented by the *certainty* than the *severity* of punishment. \* \* \* The certainty of a small punishment will make a stronger impression than the fear of one more severe, if attended with the hopes of escaping; for it is the nature of mankind to be terrified at the approach of the smallest inevitable evil, whilst hope, the best gift of Heaven, hath the power of dispelling the apprehension of a greater; especially if supported by examples of impunity, which weakness or avarice too frequently afford.

"If punishments be very severe, men are naturally led to the perpetration of other crimes, to avoid the punishment due to the first. The countries and times most notorious for severity of punishments, were always those in which the most bloody and inhuman actions and the most atrocious crimes were committed; for the hand of the legislator and the assassin were directed by the same spirit of ferocity; which on the throne dictated laws of iron to slaves and savages, and in private instigated the subject to sacrifice one tyrant, to make room for another.

"In proportion as punishments become more cruel, the minds of men, as a fluid rises to the same height with that which surrounds it, grow hardened and insensible; and the force of passions still continuing, in the space of an hundred years, the wheel terrifies no more than formerly the prison.

"There are yet two other consequences of cruel punishments, which counteract the purpose of their institution, which was, to prevent crimes. The first arises from the impossibility of establishing an exact proportion between the crime and punishment; for though ingenious cruelty hath greatly multiplied the variety of torments, yet the human frame can suffer only to a certain degree, beyond which it is impossible to proceed, be the enormity of the crime ever so great. The second consequence is impunity. Human nature is limited no less in evil than in good. Excessive barbarity can never be more than temporary; it being impossible that it should be supported by a permanent system of legislation; for if the laws

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<sup>2</sup> Becarria, Crimes and Punishments.

be too cruel, they must be altered, or anarchy and impunity will succeed."

This work of BECCARIA at the time was bitterly assailed, particularly by the lawyers; it was placed upon the Roman Index; and the vocabulary of hate and scorn was entirely exhausted. But the message spread far and wide. Few books have influenced so profoundly the thought, and indeed the legislation, of the Continent—very few within the life-time of the author. The immediate effect was to accelerate the abolition of torture, then almost universal, but in a short time a broad and general result followed. One instance will suffice. A revised edition appeared in 1781; five years later Leopold became Grand Duke of Tuscany, and substituted a mild system of punishments, whereupon there ensued a decrease in the number of offenses. For a long time the prisons were empty. The experiment was continued, and after 20 years Leopold declares, "That the mitigation of punishments, joined to the most scrupulous attention to prevent crimes, and also great despatch in the trial, together with a certainty and suddenness of punishment to real delinquents, had, instead of increasing the number of crimes, considerably diminished that of the smaller ones, and rendered those of an atrocious nature very rare."

The result was reached by mild punishments combined with prevention, swiftness, and certainty, but without mild punishments, neither of the last two is possible.

Contemporaneously with Leopold's innovation, BENTHAM, after eight years of labor, brought to final form his theories of punishment. Treating lightly the work of MONTESQUIEU, and disowning any BECCARIAN considerations of human sympathy, proceeding exclusively on the theory of utility—of "the greatest happiness"—he arrived at the same result, indicated in the following words:

"It is therefore true that the more the certainty of punishment can be augmented the more it may be diminished in amount."

In a span of fifty years, the influence of MONTESQUIEU and BECCARIA reached America, and received marked recognition from a man endowed with one of the greatest legal minds which this country ever produced—EDWARD LIVINGSTON.

After a successful professional and political career in New York City, he moved to New Orleans where he took the highest rank as a lawyer and scholar. He was the author of the Louisiana Code of Civil Procedure, and a joint-author of the Civil Code of that state. He was employed by the General Assembly to write the Penal Code, which was prepared and published, and re-published in London and

Paris, but failed of adoption. Its principles, however, including mild punishments, were formally endorsed by the General Assembly, and became the basis of a number of codes in South American countries.

Accompanying a preliminary sketch, and also the later and final draft, are introductions, which constitute one of the most remarkable contributions to the literature of penal law, and are at the same time rare examples of rhetoric, logic, and learning.

LIVINGSTON had been brought up under the Common Law, and his change of residence compelled him, owing to the peculiar history of Louisiana, to master three other systems of jurisprudence. He was obliged to prepare his draft of the Penal Code in French as well as English, and there is in literary annals no more dramatic picture than this prodigy, in the evening of life, an exile from the land of his triumphs, sitting at his lamp, re-writing the entire work, for the manuscript had met the well known fate of CARLYLE'S first manuscript of *THE FRENCH REVOLUTION*—just as it was completed and ready for the printer, it was destroyed by fire.

The theory of mild punishments and the humane viewpoint out of which it arose, together with the general agitation of the subject, eventually led us into modified methods of treating the criminal which are matters of common knowledge; the abolition of contract labor for convicts; the establishment of Juvenile Courts; the indeterminate sentence and its accompanying parole law; the probation law.

An instance in each case will sufficiently illustrate the operation of the two laws last mentioned.

In the penitentiary at Joliet, Illinois, of the 6,910 prisoners who have been paroled in twenty-one years, beginning with the enactment of the parole law, less than ten a year on the average have returned under a new sentence—only five during the two years ending September 30, 1914, the date of the last biennial report; and less than 17 per cent have in any manner violated their parole. This law has now been adopted in more than thirty states of the Union.

Under the probation law of England, when guilt is established no actual sentence is passed at the time. ASCHAFFENBURG,<sup>3</sup> in referring to the operation of this law, says that from 1888 to 1906 cases to the number of 18,000 arose under it, and the law operated successfully in all but a trifle more than 1500 instances—8.4 per cent.

ASCHAFFENBURG, by the way, believes in abolishing the death penalty; he brushes aside all other arguments and adopts the all-sufficient one that its retention will have no greater influence than its

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<sup>3</sup> *Crime and its Repression* (1906).

abolition. It is a matter of interest, also, that he regards alcohol as one of the most important inciters to crime, not only in the immediate generation but in the offspring, observing that all crimes chiefly caused by alcohol are increasing and that the increase corresponds to the steady increase in the consumption of alcohol—not in spirits, but in beer. This conclusion is notable, emanating as it does from a German who bases his conclusions upon conditions in Germany alone, and who writes not of temperance generally, but as a scientist upon the question of criminality.

In the field of criminology BECCARIA was preceded by other Italian philosophers, and was destined to be followed by still others. Italy, in this regard, has been so far in advance of the other nations that it has been styled "the fatherland of the criminal law," which is not strange, for this is the land of the Romans, the great law-givers of all time.

One of these Italian thinkers and writers, born six months after the death of LIVINGSTON, startled the world in 1875 by proclaiming and assuming to prove that 35 per cent of all criminals are so born, and bear physical marks of abnormality.

LOMBROSO was a man of tremendous cerebration, but seems to have lacked care in his deductions, and his theories are now discredited. He, however, gave a great impetus to the modern school of criminological theory, and had he been an alienist and psychologist the study of criminology would now be much further advanced.

It must be understood that modern ideas of criminology are promulgated by those who, in general, disclaim any humanitarian views, and stand upon the rock of science, but the desire for scientific investigation which characterizes the present-day philosophers would never have arisen but for the world-wide agitation for milder penalties.

As might be expected, the modern apostles do not agree with one another in all details as to either conditions or remedies, but the general statement of the new idea is well phrased by GAROFALO, in his work on CRIMINOLOGY:

"Our efforts \* \* \* are to be directed, not to measuring the quantum of harm to be inflicted upon the criminal, but to determining the kind of restraint best fitted to the peculiarities of his nature."

Since the introduction of mild punishments crime has increased in general throughout the world, and it has been claimed that the decrease in penalties is the cause and the increase in crime is the effect. The claim is, however, really restricted in its application to chronic offenders.

There are world-causes for the world-increase in crime, not the least of which is the increase in luxury, the great disintegrator of human character. Mild punishments can hardly explain the increase in crime since there has been a corresponding increase in defectives; and it cannot be claimed that mild punishments have been the cause of the latter. Moreover, it is morally certain that the increase in crime and the increase in defectives have their roots in the same soil.

The modern school calls all available science to its aid, individualizes the criminal, seeks to determine in each instance his real menace to society, and considers not only the crime but every other element, including the heredity of the criminal, his environment and habits, his history, particularly that of his youth, his physical, mental, moral, and emotional nature, his race, religion, occupation, and economic status, as well as general conditions respecting the crime, when pertinent, such as famine, heat, and, in sex crimes, the season.

This individualization of the criminal, and treating the criminal rather than the crime, as Professor POUND, "the pen of the profession," points out, is not a novel idea in jurisprudence; for example, in some fields of chancery jurisprudence we aim to suit the remedy to the man and for that purpose admit evidence of every pertinent fact. One invention of the modern school has furnished opportunity and means for such individualization, namely, the clinic, so called, where suspects, passing through the laboratory of the law in large numbers, are subjected to various tests for the purpose of determining their proper disposition in view of the welfare of society.

In Chicago, eight years since, the first clinic, or psychopathic laboratory, as an adjunct to an American court, was instituted—in connection with another Chicago innovation, the Juvenile Court. About two years ago The Municipal Court of Chicago established its psychopathic laboratory. Fortunately that tribunal is presided over by Judge HARRY OLSON, who is not only in sympathy with the work but has the proper temperament. He has the enthusiasm without which nothing important is accomplished, and, moreover, the gift of communicating it to the many judges who are subject to his guidance as Chief Justice.

The Boys' Court branch of The Municipal Court deals with those who are between the ages of 17 and 21; this Chicago laboratory, as it may be called, has therefore a double advantage; it receives cases in great numbers before mental development is arrested, and supervises a continuous diurnal procession of suspects within the world's average criminal age, which is between 16 and 24.



The laboratory is in charge of Dr. WILLIAM J. HICKSON, a specialist in neurology, who spent more than two years in intimate association with the masters in the great clinics of Germany, a country which, in this respect, is far in advance of the other nations.

The work has been greatly facilitated by the fact that the Municipal court has branches for special departments; for outside the ordinary criminal branch courts the cases are segregated in the Boys' Court, the Court of Domestic Relations, and the Morals Court, respectively: this feature and all other things considered, the Chicago laboratory has become probably the greatest in the world.

Fortunately within the last five days the court has issued an annual report, of which a free use is hereinafter made; it sets forth the results of the laboratory investigations from its foundation, May 1, 1914, to January first of this year, and covers a great array of 2,700 cases.

The court has jurisdiction of all violations of city ordinances, numerous smaller offenses against the state, and preliminary hearings in most of the serious crimes; it disposes each year of about 125,000 of these cases.

Laboratory examinations are made daily, applied, of course, to only a comparatively small number of the cases. While examination is not compulsory, an objection is rarely raised. In general only those are examined who indicate that they may be abnormal by appearance or speech, or whose abnormality is suggested by the nature of the offense. Sometimes the examination is physical, at other times mental and neurological, and again psychological. These investigations supplement an inquiry into the circumstances of the delinquency and the characteristics of the individual, his environment and his heredity.

Parenthetically it may be noted that experience, here and abroad, proves that cases of a delinquent imposing upon the examiner are almost nil.

By the psychological tests it is possible with accuracy to detect feeble-mindedness, the degree being expressed by years, with the normal development at different ages as a standard, but the great contribution to science made by the Chicago laboratory is the demonstration of the frequent alliance of feeble-mindedness and dementia praecox. This combination has an important significance. Those who suffer from the double affliction are liable to become serious offenders and to commit violent criminal assaults. Dementia praecox is "perhaps the commonest form of mental alienation, various estimates putting those afflicted with it in insane asylums at from fifty

to sixty per cent of the inmates." Most of the sex crimes and crimes of violence are perpetrated by those tainted with this disease.

Dr. HICKSON's report, among other things, covers various groups in the Boys' Court, which are designated by the terms: *average intelligence*; *high grade, borderland sociopath*; *high, middle, and low grade sociopath*; *high grade moron*; *middle grade moron*; and *low grade moron*; comprising, respectively, 126, 141, 117, 728, 151, and 52 cases. In these groups he finds the following percentages, respectively, of dementia praecox, with or without complications, 26.2, 19.8, 15.38, 14.7, 13.9, and 13.46.

In a group from the Domestic Relations Court, comprising 696 cases, he found 17.67% of the subjects afflicted with dementia praecox, and a great number with ordinary diseases to such an extent that a knowledge of their presence was material to the judgment of the court. He found 75 chronic alcoholics, and subjects suffering from epilepsy, hysteria, senile dementia, and venereal diseases; 70 were mental defectives.

As the report points out, the advantages of such a laboratory in the administration of justice can be readily perceived, and some are obvious. The judge has before him not only the individual in the flesh, and a record of his antecedents, history, and environment, but, where desired, a report and prognosis upon his physical, mental, and nervous condition.

He is enabled, in many cases, by ordering an examination, to confirm or refute the statements of the man before the bar, as well as the witnesses. He has the opportunity, as a friend of society, to be the means of discovering defects in the individual, and to recommend treatment. He has at command a medical referee available for use in personal injury suits, one who can often be used by suggestion of the court as a check upon the statements of medical witnesses, not only in this class of cases but in others. He can in many instances avert the postponement of a case where the application is made for the purpose of bringing in a medical certificate; the case can be tried when ready, and much delay and sometimes duplication of effort, as well as evidence, avoided. He is able to level rich and poor by providing an expert physician without charge. He can have at hand an opinion which he knows to be unbiased and upon which he, and the jury, also, may rely. Above all things he can separate many of those who need treatment from those who need punishment.

The question naturally arises as to what disposition is made of the subjects proved to be defective rather than criminal—in short, what use is made of the information obtained.

As to first offenders, a warning, a parole, or a mild punishment is now generally regarded as sufficient, but nevertheless some treatment or even special restraint may be indicated by the laboratory report.

The real problem is the chronic offender.

Modern criminology has placed at the command of the judge a much wider latitude in punishments than he had in the past. He must consider in view of all the data the essential character of the offender and "estimate the relative importance of inherited characteristics and environment, and finally must make a guess as to how this almost inscrutable human complex is going to react to one or more of several possible treatments. Punishment inevitably comes to be more a treatment of the individual offender than a routine treatment of a type of offense." Punishment meted out to the feeble-minded may drive the subject into hopeless criminality. "This is the great truth which explains the frequent failure of the correctional institution."

With the feeble-minded, probation is also doomed to failure, and for the same reason; on the other hand, these unfortunates can improve "outside of institutions in a simple, protected environment. Those whose feeble-mindedness is complicated with dementia praecox are more dangerous and should be confined in farm" or industrial "colonies under proper supervision," and "might be usefully employed in making roads in the state, in clearing land, and work of that sort, but would need for winter quarters perhaps institutional care;" and segregation will protect the next generation.

Some years ago a Chicago boy was executed for murder. His guilt was not doubted—he had confessed the crime. MUENSTERBERG, however, a thousand miles away, insisted that the confession was not real. In the light of modern criminal psychology the boy is now believed to have been feeble-minded and in addition to have been afflicted with dementia praecox. If Chicago had then had the benefit of its present laboratory the lad would not have been hanged, and horror would not have clutched the family.

If such institutions are established, maintained generally, kept on a high plane, and continued long enough, scientific results should be attained. Crime can not be wholly stopped in our day. But we can stem the tide that is flowing into the next generation, and in that process the modern laboratory is a promising factor. The development of science through this instrumentality will lead us to avoid useless and unjust punishment, to separate the defectives from the real criminals, and to impose penalties that are mild—not only mild in the sentence but mild in the execution. Recent

experiments in Illinois have shown that treating prisoners in the penitentiaries, including chronic offenders, "like human beings and not like beasts" has produced the most hopeful change. By establishing an hour's recreation period those whom it was found necessary to punish with solitary confinement for violation of prison rules decreased from 75 a month to 30, and this and other kindred departures from conventional prison discipline caused the prisoners to become healthier in body and mind. It is idle to say that this milder execution of sentences will not increase the prisoners' power of restraint while in prison, and to some extent, at least, after they leave. We have made no progress with the chronic offender. He has returned to the institutions with distressing regularity. It may well be that the fault has been in our treatment of him. As far as we have ameliorated it the results have been more than encouraging. We have therefore yet to learn by a fair test whether the changed treatment, further extended, and established for years, will not materially affect the record of chronic offenders. When such a test shall have been made we may learn that the great deterrent is mild punishments.

*Chicago.*

ROBERT McMURDY.